

U.S. Supreme Court Allows Disparate-Impact Claims Under Fair Housing Act

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In a recent holding, the U.S. Supreme Court determined that discrimination claims under the Fair Housing Act (FHA) may be premised on "disparate impact," meaning that a plaintiff may challenge a practice even if it was not intended to discriminate if it has a disproportionate impact on minorities and other protected classes. The Inclusive Communities Project, Inc. (ICP), a Texas-based non-profit corporation that helps low-income families obtain affordable housing, sued the Texas Department of Housing and Community Affairs for violation of the FHA related to the Department's distribution of federally funded low income housing tax credits to developers based on certain selection criteria. In *Texas Department of Housing and Community Affairs, et al. v. Inclusive Communities Project, Inc., et al.*, the ICP alleged that the Department and its officers allocated too many tax credits to housing in predominantly black inner city areas—and too few tax credits in predominantly white suburban neighborhoods—thereby perpetuating segregated housing patterns in Texas. In its analysis, the Court considered instructive its earlier decisions upholding the viability of disparate-impact claims under Title VII of the Civil Rights Act of 1964, which was enacted four years before the FHA; and the Age Discrimination in Employment Act of 1967 (ADEA), enacted four months before the FHA. In those earlier cases, the court found that the language of Title VII and the ADEA went beyond merely focusing on the actors' intent or motivation (i.e., disparate treatment) and also encompassed the action's consequences (i.e., disparate impact). Because the FHA contains language similar in function and purpose to that contained in those statutes, the court concluded that it likewise permits disparate-impact claims. The court also considered significant the FHA's 1988 amendments, would have been superfluous if Congress had assumed that only disparate-treatment claims were cognizable. Significantly, at the time of these amendments, all nine courts of appeals that addressed the issue uniformly concluded that the FHA encompassed disparate-impact claims. Congress thus made a "considered judgment" not to amend the operative language of the statute, thereby ratifying and accepting the appellate courts' view. Although disparate-impact claims are now recognized under the FHA, the plaintiff has the initial burden of establishing that the challenged practice caused or will cause a discriminatory effect. Once a *prima facie* showing of disparate impact has been made,

the burden then shifts to the defendant to demonstrate that the challenged practice is needed to accomplish "one or more substantial, legitimate, non-discriminatory interests." Once established, the burden shifts back to the plaintiff to prove that the defendant's "substantial, legitimate, nondiscriminatory interests" can be achieved by another less discriminatory practice.

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